

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

THOMAS RUSSELL HARNETT
965 Marina Drive
Napa, CA 94559

Certified Public Accountant
Certificate No. 18166

Respondent.

No. AC-97-3

OAH No. N 1998060273

DECISION AFTER NONADOPTION

This matter was heard before Nancy L. Rasmussen, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 26, 1999, at Oakland, California.

Christiana Tiedemann, Deputy Attorney General, represented complainant Carol B. Sigmänn, Executive Officer of the Board of Accountancy ("Board"), Department of Consumer Affairs, State of California.

Respondent Thomas Russell Harnett appeared and was represented by Robert E. Carey, Jr., of Carey & Carey, 706 Cowper Street, P. O. Box 1040, Palo Alto, California 94302-1040.

The record was left open for submission of written argument by the parties. Complainant's argument was received on February 16, 1999 and marked as Exhibit 8 for identification. Respondent's argument was received by fax on February 17, 1999 and by mail on February 19, 1999. The original was marked as Exhibit C for identification. The record was closed on February 19, 1999, and the matter deemed submitted.

The proposed decision of the administrative law judge was submitted to the Board of Accountancy (hereinafter "the Board") on March 19, 1999. After due consideration thereof, the Board declined to adopt said proposed decision and thereafter on May 26, 1999 issued an Order of Nonadoption and subsequently issued

an Order Fixing Date for Submission of Written Argument. The time for filing written argument in this matter having expired, written argument having been filed by complainant's attorney, the entire record, including the transcript of said hearing, having been read and considered, pursuant to Government Code Section 11517, the Board hereby makes the following decision and order:

FACTUAL FINDINGS

1. On December 8, 1972, the Board issued Certified Public Accountant ("CPA") Certificate No. 18166 to Thomas Russell Harnett ("respondent"). The certificate expired October 1, 1998, because respondent failed to pay the renewal fee and to submit a declaration of compliance with continuing education requirements. Upon receipt of the renewal fee, the certificate was renewed effective January 4, 1999, but in an inactive status because the continuing education declaration was not submitted. At the hearing, respondent asserted that he had recently completed his continuing education hours, but had not yet submitted the declaration to the Board. The certificate expiration date is September 30, 2000.

2. On June 2, 1995 in the Superior Court of the State of California, County of Alameda, (Case No. 120645-B) respondent was convicted on a nolo contendere plea of a felony violation of Corporations Code section 25541 (securities fraud). On March 4, 1996, imposition of sentence was suspended and respondent was placed on probation for three years. As a condition of probation, respondent was required to pay restitution in the amount of \$350,000. On August 3, 1998, the Court granted respondent's petition for release from penalties and dismissal under Penal Code section 1203.4.

3. Respondent's conviction arose out of his business activities as vice-president and the licensed real estate broker for Del Mar Commerce Company ("Del Mar"), a commercial real estate loan brokerage in Oakland. He went to work for Del Mar as its broker in 1985, after the death of the previous broker and owner, Jay Graves. Respondent had gotten to know Jay Graves and his wife Hildagard while doing tax work for them and Del Mar during the preceding five years, and he wanted to help Mrs. Graves continue to operate the company. Respondent maintained his tax and accounting practice in Napa, working only part time at Del Mar. Del Mar's loan brokerage business involved placement of investors' funds in secured loans on commercial property and servicing of those loans. From 1986 or 1987 until 1991, investors were paid 15% interest on their money. Although he had obtained a real estate broker's license in 1980, respondent had not used the license before he joined Del Mar.

4. In 1989, Del Mar's loan portfolio totaled 10 to 12 million dollars, and most of that was with one borrower, Raymond Castor. Respondent believed that investors in Castor loans were protected not only by their security interests in the property but also by Castor's substantial personal net worth. In October 1989, though, many of Castor's properties suffered significant damage in the Loma Prieta earthquake. Unfortunately, Castor did not disclose the extent of the damage to respondent and Graves for over a

year, by which time his fortunes had also declined because of the downturn in the real estate market and the crisis in commercial real estate lending. When Castor began to fall behind on some of his loan obligations in 1990, he assured respondent and Graves that his funding problems were temporary, and they believed him (respondent now concedes that he was "naïve" to accept Castor's assurances). Instead of foreclosing on Castor's loans, Del Mar allowed him to roll over his loans into new ones, and Del Mar, Graves, and respondent advanced their own funds to make interest payments to investors on Castor's loans. Castor represented to respondent and Graves that he would have Del Mar paid off by late 1991. Although Del Mar continued to loan investor funds to Castor, respondent was sufficiently concerned about the situation that by late 1990, stress and anxiety were taking a toll on his health. In December 1990, respondent suffered a "nervous breakdown" and was hospitalized for four days. In May 1991, he started taking Prozac and Klonopin, which made him feel less anxious, but which he now believes may have caused his thinking to be less clear than it otherwise would have been about the reality of Castor's finances. In a 1995 pre-sentencing letter to the probation office, respondent stated: "If I had been thinking clearly, I would have halted Del Mar's loan operation in order that no additional money would be placed at risk."

5. From May through August 1991, Del Mar solicited funds from investors for a loan on a commercial property in Hayward owned by Castor. Castor used the proceeds from this loan to cover past loan obligations with Del Mar. Del Mar apparently represented to investors that their loan would be secured by a trust deed in second position, when it turned out the loan was in fifth position and the property was seriously over-encumbered.¹ It was in a September 1991 meeting with Castor that respondent and Graves learned that Castor's financial situation was so dire that he would be unable to meet his obligations with Del Mar. Following this meeting, Del Mar accepted no new funds from investors and refunded monies that were in its trust account. In December 1991, Del Mar filed for Chapter 7 bankruptcy.

6. The criminal prosecution against respondent and Graves arose out of the investor losses on the two Hayward loans. Respondent estimates that the losses on the loans totaled about \$900,000, of which about \$300,000 had been invested by him, Graves and members of their families.² Of the \$600,000 from non-family investors, \$350,000 was repaid by respondent and Graves in court-ordered restitution. Respondent's attempt to repay another \$150,000 with money borrowed from family and friends was thwarted by the bankruptcy trustee, who would not allow the Hayward loan

¹ Del Mar had already loaned Castor money on the Hayward property in 1989. Respondent thought Del Mar's first "Hayward loan" was secured by a second trust deed, when in fact its trust deed was in third position (he relied on a preliminary title report obtained prior to a bank's recording a second trust deed a few days before Del Mar recorded its trust deed). Then, because of his mistaken interpretation of language in the trust deed on the first Hayward loan, respondent thought the second Hayward loan was secured by the same trust deed.

² As late as June and July 1991, respondent and Graves placed large sums of their own families' money in the second Hayward loan.

investors to receive preference over other investors and lenders. Investors of about \$150,000 wrote letters to the criminal court supporting respondent and stating that they did not expect repayment.

7. As of 1991, total losses suffered by non-family investors in Del Mar loans were in the range of 7 to 8 million dollars. Eventually, some of these losses were repaid through the bankruptcy proceeding. Some loans were totally paid by the borrowers, some were partially paid, and some properties were sold and the proceeds distributed.

8. Respondent and Hildagard Graves had invested large sums of their own money in Del Mar loans, and they were financially ruined when the company went under. Many of their family members also sustained large losses. Respondent relinquished any claims for repayment of monies he lost.

9. Effective May 11, 1992, the Department of Real Estate revoked respondent's broker's license in an administrative action that respondent did not contest. The revocation was based on 1988 and 1989 violations found in a Department audit of Del Mar's books and records. These violations included a trust fund shortage; commingling of non-trust monies in the trust account; conversion of trust funds to uses and benefits not authorized by the owners of the funds; use of stationary containing a representation that Del Mar had offices in Nevada, Oklahoma, Hawaii, and Arizona, when those offices had been closed; and rolling over loan payoff funds into new loans without the investors' prior written consent.

10. There was no direct connection between respondent's tax and accounting practice and his business activities at Del Mar, although about 10 to 12 of his tax clients were among the Del Mar investors. All but two of them remained clients of his after the collapse of Del Mar. Many of respondent's clients submitted letters on his behalf in this proceeding, attesting to his integrity and professionalism as an accountant, and acknowledging his remorse and suffering over the Del Mar debacle.

11. Respondent originally testified that he had been working continuously as a CPA since he was licensed in 1972. When asked on cross-examination about the fact that he had not had a valid CPA certificate since September 1998, however, he asserted that the work he performed after that time did not require him to be a CPA, and he had not signed any documents as a CPA. He testified that he was unsure whether he had used any of his CPA letterhead stationery.

12. Respondent deeply regrets the losses suffered by Del Mar investors, and feels great remorse for his mistakes and poor judgment in continuing Del Mar's loan operation as long as he did after learning of Castor's financial difficulties. While he believes there would still have been losses if Del Mar had stopped loaning Castor money in 1990, the losses would not have been as great. Respondent maintains that he never intended to put any lender's money in harm's way.

13. As of January 21, 1999, the Board had incurred the following costs in the investigation and prosecution of this accusation:

**Investigative Services from
the Board's Investigative CPA:**

1995/96 Fiscal Year	
26.00 hours @ \$64.06/hour	\$1,665.56
1996/97 Fiscal Year	
18.25 hours @ \$67.53/hour	\$1,232.42
1997/98 Fiscal Year	
3.75 hours @ \$67.53/hour	\$ 253.23

Investigative CPA Subtotal	\$3,151.21
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**Services from the Attorney
General's Office**

1996/97 Fiscal Year	
21.50 hours @ \$98.00/hour	\$2,107.00
1997/98 Fiscal Year	
4.25 hours @ \$100.00/hour	\$ 425.00
1998/99 Fiscal Year	
19.00 hours @ \$100.00/hour	\$1,900.00

Attorney General's Subtotal	\$4,432.00
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TOTAL ACTUAL COSTS	\$7,583.21
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Additionally, the Board estimated on January 21, 1999 that it would incur further costs of \$800 (8.00 hours of Attorney General services) for the period from January 22 through 26, 1999.

LEGAL CONCLUSIONS

1. Business and Professions Code section 5100 authorizes the Board to discipline a certified public accountant for unprofessional conduct. Unprofessional conduct includes "[c]onviction of any crime substantially related to the qualifications, functions and duties of a certified public accountant..." (subdivision (a)) and "[s]uspension or revocation of the right to practice before any governmental body or agency" (subdivision (g)).

2. Finding 2. Cause for discipline for respondent's certified public accountant certificate exists pursuant to Business and Professions Code section 5100(a) by reason of his 1995 criminal conviction.

3. Finding 9: Cause exists to discipline respondent's certified public accountant certificate pursuant to Business and Professions Code section 5100(g) by reason of the revocation of his real estate broker's license for causes substantially related to the qualifications, functions or duties of a certified public accountant.

4. Complainant has requested that respondent be ordered to pay the Board the costs of investigating and prosecuting the case. Business and Professions Code section 5107 provides that respondent may be ordered to pay the Board "all reasonable costs of investigation and prosecution of the case, including, but not limited to, attorney's fees." However, the Board is not entitled to recover "costs incurred at the administrative hearing." The actual costs of investigation and prosecution as of January 21, 1999 are \$7,583.21 (see Finding 13). In the absence of any evidence to the contrary, this amount is determined to be reasonable, and respondent shall reimburse the Board in this amount. The Board may not recover the Attorney General's costs it estimated it would incur from January 22, 1999 through January 26, 1999 (the date of the administrative hearing), because of the statutory prohibition on recovering costs incurred at the hearing.

5. In her Proposed Decision, the Administrative Law Judge found that it had not been shown that respondent engaged in unlicensed activity. However, the Board finds that respondent continued to hold himself out to be a CPA or did engage in activity for which an active license as a CPA is required after October 1, 1998, the time of expiration of his CPA license. While, as stated in Finding 1 above, respondent did on January 4, 1999 eventually renew his license, he did so in an inactive status. In addition, even as of the date of the hearing before the Administrative Law Judge, as the holder of an inactive license, respondent was still not entitled to engage in practice as a CPA. The letters submitted in January 1999 in support of respondent indicate that the writers believed at the time of writing that respondent was lawfully permitted to engage in practice. Moreover, among these letters are several from persons who regarded themselves as continuing, current clients of respondent. These letters confirm respondent's own testimony at the hearing that he had engaged in the continuous practice of public accountancy since 1972.

6. Determining the appropriate measure of discipline in this matter requires an evaluation of the potential for public harm if respondent is allowed to keep his CPA certificate. Although respondent did not intend for Del Mar investors to lose money, his wishful thinking, poor judgment and knowing non-disclosure of material information caused investors to sustain much greater losses than they otherwise would have. While respondent's dereliction of duty did not occur in his activities as a CPA, he occupied a similar position of trust as a real estate broker, and his conduct at Del Mar is very relevant to his fitness for licensure as a CPA. In reaching its decision, the Board has

considered the fact that his acts or omissions at Del Mar occurred eight years ago, he is genuinely remorseful and has made considerable efforts to make restitution and he has successfully completed his criminal probation.

ORDER

Certified Public Accountant Certificate No. 18166 issued to respondent Thomas Russel Harnett is revoked pursuant to Conclusions 2 and 3, separately and for both of them.

Respondent shall reimburse the Board \$7,583.21 for its investigation and prosecution costs. Payments shall be made within 120 days of the effective date of this decision, unless the time for payment is extended by the Board.

This decision shall become effective on November 7, 1999.

DATED: October 8, 1999

H.S. Michelson

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the matter of the Accusation)
against:)

THOMAS RUSSELL HARNETT)
965 Marina Drive)
Napa, CA 94559)

Case No.: No. AC-97-3
OAH No. N 1998060273

Certificate No. 18166,

Respondent.

ORDER OF NONADOPTION OF PROPOSED DECISION

Pursuant to Section 11517 of the Government Code, the Proposed Decision of the Administrative Law Judge in the above-entitled matter is not adopted. The Board of Accountancy will decide the case upon the record, including the transcript of the hearings held on January 26, 1999, and upon such written argument as the parties may wish to submit. The Board of Accountancy is particularly interested in arguments directed to the question of what discipline would be appropriate in this matter. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

IT IS SO ORDERED this 26 day of MAY, 1999.

H. E. Michelson
Board President

**BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Accusation
Against:**

**THOMAS RUSSELL HARNETT
965 Marina Drive
Napa, CA 94559**

**Certified Public Accountant
Certificate No. 18166**

Respondent.

No. AC-97-3

OAH No. N 1998060273

PROPOSED DECISION

This matter was heard before Nancy L. Rasmussen, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 26, 1999, at Oakland, California.

Christiana Tiedemann, Deputy Attorney General, represented complainant Carol B. Sigmann, Executive Officer of the Board of Accountancy ("Board"), Department of Consumer Affairs, State of California.

Respondent Thomas Russell Harnett appeared and was represented by Robert E. Carey, Jr., of Carey & Carey, 706 Cowper Street, P. O. Box 1040, Palo Alto, California 94302-1040.

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3. Respondent's conviction arose out of his business activities as vice-president and the licensed real estate broker for Del Mar Commerce Company ("Del Mar"), a commercial real estate loan brokerage in Oakland. He went to work for Del Mar as its broker in 1985, after the death of the previous broker and owner, Jay Graves. Respondent had gotten to know Jay Graves and his wife Hildagard while doing tax work for them and Del Mar during the preceding five years, and he wanted to help Mrs. Graves continue to operate the company. Respondent maintained his tax and accounting practice in Napa, working only part time at Del Mar. Del Mar's loan brokerage business involved placement of investors' funds in secured loans on commercial property and servicing of those loans. From 1986 or 1987 until 1991, investors were paid 15% interest on their money. Although he had obtained a real estate broker's license in 1980, respondent had not used the license before he joined Del Mar.

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of foreclosing on Castor's loans, Del Mar allowed him to roll over his loans into new ones, and Del Mar, Graves and respondent advanced their own funds to make interest payments to investors on Castor's loans. Castor represented to respondent and Graves that he would have Del Mar paid off by late 1991. Although Del Mar continued to loan investor funds to Castor, respondent was sufficiently concerned about the situation that by late 1990, stress and anxiety were taking a toll on his health. In December 1990, respondent suffered a "nervous breakdown" and was hospitalized for four days. In May 1991, he started taking Prozac and Klonopin, which made him feel less anxious, but which he now believes may have caused his thinking to be less clear than it otherwise would have been about the reality of Castor's finances. In a 1995 pre-sentencing letter to the probation office, respondent stated: "If I had been thinking clearly, I would have halted Del Mar's loan operation in order that no additional money would be placed at risk."

5. From May through August 1991, Del Mar solicited funds from investors for a loan on a commercial property in Hayward owned by Castor. Castor used the proceeds from this loan to cover past loan obligations with Del Mar. Del Mar apparently represented to investors that their loan would be secured by a trust deed in second position, when it turned out the loan was in fifth position and the property was seriously over-encumbered.¹ It was in a September 1991 meeting with Castor that respondent and Graves learned that Castor's financial situation was so dire that he would be unable to meet his obligations with Del Mar. Following this meeting, Del Mar accepted no new funds from investors and refunded monies that were in its trust account. In December 1991, Del Mar filed for Chapter 7 bankruptcy.

6. The criminal prosecution against respondent and Graves arose out of the investor losses on the two Hayward loans. Respondent estimates that the losses on the loans totaled about \$900,000, of which about \$300,000 had been invested by him, Graves and members of their families.² Of the \$600,000 from non-family investors, \$350,000 was repaid by respondent and Graves in court-ordered restitution. Respondent's attempt to repay another \$150,000 with money borrowed from family and friends was thwarted by the bankruptcy trustee, who would not allow the Hayward loan investors to receive preference over other investors and lenders. Investors of about \$150,000 wrote letters to the criminal court supporting respondent and stating that they did not expect repayment.

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9. Effective May 11, 1992, the Department of Real Estate revoked respondent's broker's license in an administrative action that respondent did not contest. The revocation was based on 1988 and 1989 violations found in a Department audit of Del Mar's books and records. These violations included a trust fund shortage; commingling of non-trust monies in the trust account; conversion of trust funds to uses and benefits not authorized by the owners of the funds; use of stationary containing a representation that Del Mar had offices in Nevada, Oklahoma, Hawaii and Arizona, when those offices had been closed; and rolling over loan payoff funds into new loans without the investors' prior written consent.

10. There was no direct connection between respondent's tax and accounting practice and his business activities at Del Mar, although about 10 to 12 of his tax clients were among the Del Mar investors. All but two of them remained clients of his after the collapse of Del Mar. Many of respondent's clients submitted letters on his behalf in this proceeding, attesting to his integrity and professionalism as an accountant, and acknowledging his remorse and suffering over the Del Mar debacle.

11. Respondent originally testified that he had been working continuously as a CPA since he was licensed in 1972. When asked on cross-examination about the fact that he had not had a valid CPA certificate since September 1998, however, he asserted that the work he performed after that time did not require him to be a CPA, and he had not signed any documents as a CPA. He was unsure whether he had used any of his CPA letterhead stationary.

12. Respondent deeply regrets the losses suffered by Del Mar investors, and feels great remorse for his mistakes and poor judgment in continuing Del Mar's loan operation as long as he did after learning of Castor's financial difficulties. While he believes there would still have been losses if Del Mar had stopped loaning Castor money in 1990, the losses would not have been as great. Respondent maintains that he never intended to put any lender's money in harm's way.

13. As of January 21, 1999, the Board had incurred the following costs in the investigation and prosecution of this accusation:

**Investigative Services from
the Board's Investigative CPA:**

1995/96 Fiscal Year
26.00 hours @ \$64.06/hour \$1,665.56

1996/97 Fiscal Year
18.25 hours @ \$67.53/hour \$1,232.42

1997/98 Fiscal Year
3.75 hours @ \$67.53/hour \$ 253.23

Investigative CPA Subtotal \$3,151.21

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21.50 hours @ \$98.00/hour \$2,107.00

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19.00 hours @ \$100.00/hour \$1,900.00

Attorney General's Subtotal \$4,432.00

TOTAL ACTUAL COSTS \$7,583.21

Additionally, the Board estimated on January 21, 1999 that it would incur further costs of \$800 (8.00 hours of Attorney General services) for the period from January 22 through 26, 1999.

LEGAL CONCLUSIONS

1. Business and Professions Code section 5100 authorizes the Board to discipline a certified public accountant for unprofessional conduct. Unprofessional conduct includes "[c]onviction of any crime substantially related to the qualifications, functions and duties of a certified public accountant..." (subdivision (a)) and "[s]uspension or revocation of the right to practice before any governmental body or agency" (subdivision (g)).

2. Finding 2: Cause for discipline of respondent's certified public accountant certificate exists pursuant to Business and Professions Code section 5100(a) by reason of his 1995 criminal conviction.

3. Finding 9: Cause exists to discipline respondent's certified public accountant certificate pursuant to Business and Professions Code section 5100(g) by reason of the revocation of his real estate broker's license for causes substantially related to the qualifications, functions or duties of a certified public accountant.

4. Complainant has requested that respondent be ordered to pay the Board the costs of investigating and prosecuting the case. Business and Professions Code section 5107 provides that respondent may be ordered to pay the Board "all reasonable costs of investigation and prosecution of the case, including, but not limited to, attorneys' fees." However, the Board is not entitled to recover "costs incurred at the administrative hearing." The actual costs of investigation and prosecution as of January 21, 1999 are \$7,583.21 (see Finding 13). In the absence of any evidence to the contrary, this amount is determined to be reasonable, and respondent shall reimburse the Board in this amount. The Board may not recover the Attorney General's costs it estimated it would incur from January 22, 1999 through January 26, 1999 (the date of the administrative hearing), because of the statutory prohibition on recovering costs incurred at the hearing.

5. Determining the appropriate measure of discipline in this matter requires an evaluation of the potential for public harm if respondent is allowed to keep his CPA certificate. Although respondent did not intend for Del Mar investors to lose money, his wishful thinking, poor judgment and knowing non-disclosure of material information caused investors to sustain much greater losses than they otherwise would have. While respondent's dereliction of duty did not occur in his activities as a CPA, he occupied a similar position of trust as a real estate broker, and his conduct at Del Mar is very relevant to his fitness for licensure as a CPA. In respondent's favor, however, is the fact that his acts or omissions at Del Mar occurred eight years ago, he is genuinely remorseful and has done everything he could to make restitution, he has successfully completed his criminal probation, and there is no evidence that he has committed any violations as a CPA. In fact, many of his clients praise him for his excellent services over the years. The only blemish on respondent's record of rehabilitation is the matter of whether he acted as, or held himself out to be, a CPA after his certificate became invalid last October. While his testimony about working continuously as a CPA since 1972 is at odds with his later qualification regarding his post-September work not requiring a CPA, and his uncertainty about whether he had used his CPA stationary is suspicious, it has not been shown that he engaged in unlicensed activity. Considering all the facts and circumstances of this case, it appears unlikely that respondent will engage in unscrupulous or unlawful conduct as a CPA in the future. The public interest will be adequately protected if respondent's certificate is placed on probation subject to appropriate terms and conditions, including a substantial period of suspension.

ORDER

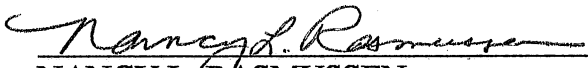
Certified Public Accountant Certificate No. 18166 issued to respondent Thomas Russell Harnett is revoked pursuant to Conclusions 2 and 3, separately and for both of them. However, the revocation is stayed and respondent is placed on probation for 5 years upon the following terms and conditions:

1. Commencing from the effective date of this decision, respondent's certificate shall be suspended for 180 days. During the period of suspension, respondent shall engage in no activities for which certification as a Certified Public Accountant or Public Accountant is required as described in Business and Professions Code, Division 3, Chapter 1, Section 5051.
2. Respondent shall comply with procedures provided by the Board or its designee regarding notification to clients of the suspension, and management of clients during the suspension.
3. Respondent shall obey all federal, California, other states' and local laws, including those rules relating to the practice of public accountancy in California.
4. Respondent shall submit, within 10 days of completion of the quarter, written reports to the Board on a form obtained from the Board. Respondent shall submit, under penalty of perjury, such other written reports, declarations, and verifications of actions as are required. These declarations shall contain statements relative to respondent's compliance with all the terms and conditions of probation. Respondent shall immediately execute all release of information forms as may be required by the Board or its representatives.
5. Respondent shall, during the period of probation, appear in person at interviews/meetings as directed by the Board or its designated representatives, provided such notification is accomplished in a timely manner.
6. Respondent shall fully comply with the terms and conditions of the probation imposed by the Board and shall cooperate fully with representatives of the Board in its monitoring and investigation of his compliance with probation terms and conditions.

7. Respondent shall be subject to, and shall permit, a practice investigation of his professional practice. Such a practice investigation shall be conducted by representatives of the Board, provided notification of such review is accomplished in a timely manner.
8. Respondent shall comply with all final orders resulting from citations issued by the Board.
9. In the event respondent should leave California to reside or practice outside this state, respondent must notify the Board in writing of the dates of departure and return. Periods of non-California residency or practice outside the state shall not apply to reduction of the probationary period, or of any suspension. No obligation imposed herein, including requirements to file written reports, reimburse the Board costs, or make restitution to consumers, shall be suspended or otherwise affected by such period of out-of-state residency or practice except at the written direction of the Board.
10. Respondent shall at all times maintain an active certificate status with the Board, including during the period of suspension. If the certificate is in an inactive status at the time the Board's decision becomes effective, the period of probation shall not commence until the certificate is active.
11. Respondent shall reimburse the Board \$7,583.21 for its investigation and prosecution costs. Payment shall be made within 120 days of the effective date of this decision, unless the time for payment is extended by the Board.
12. If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or a petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

13. Upon successful completion of probation, respondent's certificate will be fully restored.

DATED: March 19, 1999


NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

1 DANIEL E. LUNGREN, Attorney General
2 of the State of California
3 JEANNE C. WERNER
4 Deputy Attorney General, State Bar No. 93170
5 Department of Justice
6 2101 Webster Street, 12th Floor
7 Oakland, CA 94612-3049
8 Telephone: (510) 286-3787
9 Fax: (510) 286-4020
10
11 Attorneys for Complainant

12
13 **BEFORE THE**
14 **BOARD OF ACCOUNTANCY**
15 **DEPARTMENT OF CONSUMER AFFAIRS**
16 **STATE OF CALIFORNIA**

17
18 In the Matter of the Accusation) NO. AC-97-3
19 Against:)
20) ACCUSATION
21 THOMAS RUSSELL HARNETT)
22 5 Financial Plaza, Suite 120)
23 Napa, CA 94558)
24)
25 Certified Public Accountant)
26 Certificate No. 18166)
27 Respondent.)

18 Complainant Carol B. Sigmann, as cause for disciplinary
19 action, alleges:

20 1. Complainant is the Executive Officer of the
21 California Board of Accountancy ("Board") and makes and files
22 this accusation solely in her official capacity.

23 LICENSE INFORMATION

24 2. On or about December 8, 1972, Certified Public
25 Accountant Certificate No. 18166 was issued by the Board to
26 Thomas Russell Harnett ("Respondent"), and at all times relevant
27 herein, said Certified Public Accountant Certificate was, and

1 currently is, in full force and effect.

2 STATUTES AND REGULATIONS

3 3. At all times material herein, section 5100 of the
4 California Business and Professions Code (hereinafter the "Code")
5 has provided that "(a)fter notice and hearing, the Board may
6 revoke, suspend or refuse to renew any permit or certificate"
7 issued by the Board, for unprofessional conduct which includes,
8 but is not limited to, the conviction of any crime substantially
9 related to the qualifications, functions, and duties of a
10 Certified Public Accountant [Code section 5100(a)].

11 4. Code section 5107 provides for recovery by the
12 Board of all reasonable costs of investigation and prosecution of
13 the case, including, but not limited to, attorney's fees in
14 specified disciplinary actions. A certified copy of the actual
15 costs, or a good faith estimate of costs signed by the Executive
16 Officer, constitute prima facie evidence of reasonable costs of
17 investigation and prosecution of the case.

18 5. Under Board Rule 99^{1/}, a crime or act is
19 substantially related to the qualifications, functions, or duties
20 of a CPA if, to a substantial degree, it evidences present or
21 potential unfitness to perform the functions authorized by the
22 licensee's certificate or permit in a manner consistent with the
23 public health, safety, or welfare.

24 FOR CAUSE FOR DISCIPLINE

25 6. Respondent is subject to disciplinary action
26

27 1. Codified at Title 16, California Code of Regulations,
section 99.

1 pursuant to Code section 5100(a) in that, on June 2, 1995, or on
2 June 2, 1996^{2/}, in the Superior Court of the State of California,
3 County of Alameda, in *People of the State of California vs.*
4 *Hildagard Buckette Graves and Thomas Russell Harnett*, Case No.
5 120645-B, Respondent pled nolo contendere to a felony violation
6 of section 25541 of the California Corporation Code^{3/} (as charged
7 in the Seventy First Count of the Information). The Information
8 charged that Respondent intentionally took funds and property of
9 a value exceeding \$150,000 within the meaning of Penal Code
10 section 12022.6(b). Respondent pled nolo contendere to the
11 enhancement clause. Respondent was placed on probation for three
12 years, was ordered to make restitution in the amount of \$350,000,
13 and was ordered to honor all civil judgments.

14 7. Circumstances Related to the Charge. The charge
15 to which Respondent pled nolo contendere concerns circumstances
16 in which Respondent, on or about and between May 1, 1991 and
17 September 18, 1991, as vice president and the licensed real
18 estate broker of Del Mar Commerce Company in Oakland, California,
19 engaged in acts, practices and a course of business which

20
21 2. While the court's Minute Order re: Probation recites
22 that the defendant was convicted on June 2, 1996, by a plea of
23 nolo contendere, other information available to the complainant
supports the complainant's belief that the actual date of
conviction is June 2, 1995, and that the Minute Order contains a
typographical error with respect to the year.

24 3. Section 25541 provides criminal penalties for any
25 "person who willfully employs, directly or indirectly, any
26 device, scheme, or artifice to defraud in connection with the
27 offer, purchase, or sale of any security or willfully engages,
directly or indirectly, in any act, practice, or course of
business which operates or would operate as a fraud or deceit,
upon any person in connection with the offer, purchase, or sale
of any security".

operated as a fraud and deceit upon a person or persons in connection with the offer, purchase and sale of a security, as to each of the investors in certain loans. Investors, including Respondent, lost approximately \$12,000,000. Among the investors were tax clients of the licensee. Respondent has made restitution in an amount known to Respondent but not to complainant.

8. Incorporating by reference the allegations in paragraph 7, Respondent's certificate is subject to discipline in that the felony conviction is a crime substantially related to the qualifications, functions or duties of a CPA within the meaning of Board Rule 99.

OTHER MATTERS

9. Pursuant to Code section 5107, it is requested that the administrative law judge, as part of the proposed decision in this proceeding, direct Respondent to pay to the Board all reasonable costs of investigation and prosecution in this case, including, but not limited to, attorneys' fees.

10. It is charged, in aggravation of penalty, that the Respondent's crimes involved the actual taking of great monetary value and that he took advantage of a position of trust or confidence to commit the offenses.

PRAYER

WHEREFORE, complainant requests that the Board hold a hearing on the matters alleged herein, and that following said hearing, the Board issue a decision:

1. Revoking or suspending Certified Public Accountant

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Certificate No. 18166, heretofore issued to
Respondent Thomas Russell Harnett;

2. Awarding the Board costs as provided by statute;
and

3. Taking such other and further action as the Board
deems proper.

DATED: April 10, 1997

Carol B. Sigmann
Carol B. Sigmann
Executive Officer
Board of Accountancy
Department of Consumer Affairs
State of California

Complainant

JCW:pam
C:\JEANNE\HARNETT\ACC
(4/7/97)